HÁSKÓLINN Á AKUREYRI, HUG- OG FÉLAGSVÍSINDADEILD, LAGASKOR, 2009

Self Defence or Reprisals?

The legality of the United States' response to the 9/11 attacks

By, Andrés Már Magnusson

5/8/2009

Lokaverkefni í Hug- og Félagsvísindadeild

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Leiðbeinandi: Rachael Lorna Johnstone

Lokaverkefni til 90 eininga B.A-prófs / 60 eininga M.L.-prófs í Hug- og Félagsvísindadeild

Ég/við lýsi/lýsum því hér með yfir að ég einn er höfundur þessa verkefnis og að það er ágóði eigin rannsókna

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Andrés Már Magnússon

Það staðfestist hér með að lokaverkefni þetta fullnægir að mínum dómi kröfum til B.A.-prófs / M.L.-prófs í Félagsvísinda- og lagadeild

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Rachael Lorna Johnstone

Abstract

The attacks on the Twin Tower 9/11 2001 and consequent invasion in Afghanistan has raised much questions to whether the Taliban regime bore responsibility and whether non-state actor could commit armed attack. Relevant law is the Charter most significantly Art. 51 regarding the *inherent right to self defence.* Other relevant law is the ILC Articles as they provide the rules regarding State responsibility.

In the invasion of Afghanistan military actions were taken both against the Taliban and Al Qaeda even though the Taliban bore no direct-responsibility for the attack on 9/11 because Al Qaeda could not be imputed as state organs. Nonetheless it is the Authors view that they bear responsibility for the aid, harbour and support. Further the author believes that the Taliban can, because of their involvement, be subject to the same measures as the terrorist groups they support, including self defence.

For legal self defence there has to be an armed attack on the State, much debate has risen as scholars claim that an armed attack could not be committed by non-state actors, as ICJ has expressed. There is however nothing in the wording of Art. 51 which says that only states can commit armed attack and the structure of the ICJ limits its interpretation to States and does not exclude armed attacks by non-state actors.

In the concept of self defence are the restrains of necessity and proportionality. Although the United States waited for 26 days to invoke self defence it does not preclude the self defence as custom, and necessity test itself binds states to try all other measures before resorting to military actions. The response of the Unites States is legal as the Taliban's failed their obligation and rather than suffer further attacks they took necessary and proportioned actions in accordance to international law.

Úrdráttur

Árásin á Tvíburaturnana í New York 11. September 2001 og innrás NATO í Afganistan eftir á hefur vakið upp mikla umræðu, annars vegar, um hvort Talibanastjórnin hafi borið ábyrgð. Hins vegar, hvort hryðjuverkahópar sem ekki hafa tengsl við ríki geti vakið upp rétt varnarríkisins til að verja sig í samræmi við 51.gr. Sáttmála Sameinuðu þjóðanna.

Árásin í Afganistan var þó ekki eingöngu beint gegn Al Qaida, hryðjuverkahópnum sem skipulagði og framkvæmdi árásina, heldur einnig gegn Talibanastjórninni sem veitti þeim skjól. Höfundur telur að samkvæmt alþjóðarlögum bera ríki einungis ábyrgð á eigin gjörðum en ekki á gjörðum þeirra sem þau veita skjól. Þrátt fyrir það hafi sjálfsvörnin ekki verið ólögleg þar sem samkvæmt alþjóðarlögum og alþjóðarvenjurétti geti ríki, sem sökum stuðning síns við hryðjuverkahóp, mátt sæta þeirra mótgjörða sem varnarríkið tekur, þar með talið sjálfsvörn.

Til að geta beitt sjálfsvörn í samræmi við 51.gr. Sáttmála Sameinuðu þjóðanna þarf að vera ráðist á ríki með hervaldi („armed attack“). Mikil umræða hefur risið um hvort aðrir aðilar en ríki geti beitt hervaldi í samræmi við 51.gr. Það er ekkert í orðalagi greinarinnar sjálfri sem útilokar slíkt. Einnig er uppbygging Alþjóðardómstólsins þannig hagað að hann getur ekki tekist á við önnur mál en milli Ríkja og því hefur hann ekki fengið tækifæri að tjáð sig um lögmæti hervald annarra en ríkja.

Við kjarna Sjálfsvarnar eru vissar hömlur, sjálfsvörn þarf að vera nauðsynleg og í hlutfalli við árásina. Þrátt fyrir 26 dagar hafi liðið áður en sjálfsvörnin var vakinn þá er það einungis vegna þess að ríki telja sig þurf að grípa til allra ráða áður en gripið er til

vopnavalds. Innrásin í Afganistan var lögleg þar Talibanastjórnin greip ekki til varúðaráðstafanna og í stað þess að þurfa að sitja annarri árás tóku Bandaríkjamenn nauðsynlegar og hlutfallslegar varúðaráðstafanir sér til varnar.

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Preface

The law of war changed rapidly during and after the World Wars. Weapons and weaponry has become all too powerful, fast and dangerous for states to show lenience in matters of war and security. After WWII the “winning” nations came together and founded the United Nation, introducing the United Nation Charter, which imposed on member states a new no-war policy.

Since then, international persons and companies have grown more powerful and wealth is no longer something countries solely possess. International law is based on the relation of states *vis á vis* one another but as individuals and companies grow more powerful, international law, originally intended to put constrains on countries, might have to be interpreted or amended to impose similar constrains on individual or international companies.

Weapons and funds are now widely available to individual and groups, who can create personal armies ready to take action, not for nationality, but for vision or simply an order from an individual. On 9/11, one of the blackest days in Worlds history, a group, Al Qaeda*,* hijacked airplanes and used them as weapons against the United States, not aiming on military targets but towards civilians. In the aftermath the United State took actions against Al Qaeda and against the Taliban regime, the largely unrecognized *de facto* government of the country from which the terrorist group had orchestrated and executed their attack. Justifying their action the United States claimed, in line with article 51 of the Charter, self defence. This thesis will try to answer whether U.S.' and U.K.'s respone to 9/11 was legal or not. Answering the key questions: whether the Taliban regime bore responsibility, whether an armed attack can be committed by a non-state actor, what constitutes an armed attack and whether 9/11 fits that module, and whether the actions taken were in line with other requirements of self defence. This thesis will only discuss the question whether the military actions, taken after the attack of 9/11, were in line with the right to self defence. After the Taliban had been overthrown and a new government created the military actions changed from self defence to military actions with the consent of the host state.

PART I – Introduction

Historical introduction to the period immediately surrounding the attack

On 9th of September 2001 the Twin Towers in New York City and the Pentagon in Virginia were attacked. Whereby three hijacked airplanes,[1] controlled by *Al Qaeda* members, a terrorist group led by a man named Osama bin Laden, were changed into weapons of great destruction. Targeting the United States (world order) but aiming it against innocent citizens in hope to construe and spread fright and terror. The result was the death of over 3000 innocent people of 81 nationalities, including all of the passengers on the planes and the death of members of rescue teams.[2] The attack was of grave matter and nearly every nation in the world condemned the attack and expressed their sincere condolences,[3] including the Taliban regime in Afghanistan.

The next day the Security Council issued Resolution 1368 in which it condemns the attacks and "*recognizes* the inherent right of individual or collective self defence in accordance with the Charter"[4] as well as it expresses "its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001",[5] setting the tone for what was to come. Later, after another meeting of the Security Council, they issued a more detailed resolution on the situation and the aftermath of the attack. They obliged states to take up strict rules regarding terrorism, including rules pertaining to those who had indirect connections to terrorists, harbouring them or financing.[6]

Only a handful of states raised concerns and the Iranian minister of foreign affairs was a rare voice, saying that; "Under the UN law[the United States has] the right to defend itself, but first those behind the attack should be identified and then punished. . .. No evidence has

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[1] As well as the Fourth plane which crashed in Pennsylvania after the terrorists were overpowered by the passengers.
[2] New York Media, *Death, destruction, charity, salvation, war, money, real estate, spouses, babies, and other September 11 statistics,* New York Magazine, (accessed, 4. Mai 2009) http://nymag.com/news/articles/wtc/1year/numbers.htm
[3] Excluding Iraq, *see;* Susan hall, *Iraq stands alone as Arab World offers sympathy and regrets,* The Guardian, Sep. 13, 2001. (accessed, 6. Mai 2009), http://www.guardian.co.uk/world/2001/sep/13/september11.iraq
[4] S.C, Res. 1368, U.N. Doc. S/RES/1368 (Sept.12, 2001)
[5] *Id*
[6] S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)

been offered to show [bin Laden's] implication in the attack. If there is such evidence it should be offered to the people." [7]

Nearly a month later, on 7th of October the United States of America alongside other NATO members issued to the United Nations Security Council [hereinafter the Security Council] letters announcing their plan to invade Afghanistan by invoking their *inherent right* to self defence. The very same day they launched military operation against Afghanistan by aerial bombing, followed by an occupation of country and deposing of the Taliban government.[8] All of this was done under article 51 of the UN Charter, which declares the *inherent* right of states to self defence.

A brief introduction to the relevant law

Article 38 of the Statute of the International Court of Justice provides a list for the sources of international law.[9] This includes treaties, international custom, general principles of nations, opinions of highly qualified scholars and judicial decisions.[10] Although there is no hierarchy in explicitly stated article 38 the most commonly used are the international treaties and customary international law.

Treaties, or conventions, are the only way States can create international law consciously. Treaties have to be signed and ratified to come to force.[11] The Vienna Convention of Law of Treaties[12] [hereinafter the Vienna Convention] governs the way international treaties should be interpreted. The section containing the interpretational rules has also become customary international law and therefore also applies to states which have not ratified the Vienna Convention.[13] According to the Vienna Convention the elements of interpretational rules are; *text* (interpretation according to the plain and natural meaning of

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[7] Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11,* The American Journal of International Law, Vol. 96, No. 4. (Oct. 2002), p. 910, footnote. 26.

[8] Ian Christopher McCaleb, *Defense officials: Air operation to last 'several days'*, CNN.com U.S. (Oct. 7, 2001) (accessed 6. Mai, 2009) http://archives.cnn.com/2001/US/10/07/ret.attack.pentagon/

[9] Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993, Article 38.

[10] *Id.*

[11] Martin Dixon, *Textbook on International Law,* 6th ed. (United States, Oxford University press, 2007), p. 26.

[12] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[13] Dixon, *supra* note 11, pp. 61-2

the treaty terms), *context* (including the whole text, preamble annexes and related agreements), and *object & purpose* (considering the overall object and purpose of the treaty and the intentions of its framers).[14] In addition, the principle of *effectiveness* must be considered, meaning that a treaty should be interpreted to ensure maximum effectiveness.[15] The Charter of the United Nation [hereinafter the Charter] is the most important treaty in contemporary international law and, as a treaty, its interpretation is also governed by the Vienna Convention.

Customary international law is the law that has evolved from the practise of states.[16] Advantages to customary law is that custom has universal application as treaties do only apply to States which have ratified it. Some treaties, like parts of the Vienna Conventions have become, or reflect, customary international law. Customary law has two elements, the *usus* of states (consistent state practice) and *opinion juris* (States must recognise that practise as binding). International custom is therefore based on the State practices and the belief of States that this practice is the law.[17]

Art. 2(4) of the Charter states that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[18]

Art. 2(4) states that the threat or the use of force is strictly banned. No state can exercise any use of force against another state. The purpose mentioned in Art. 2(4) is laid out in Art. 1 of the Charter. The first sentence lays out the purpose of the Charter: "To maintain international peace and security."[19] Combined; Art. 1 and Art. 2(4) expressly state that use of force is

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[14] Vienna Convention, *supra* note 12, article 31.
[15] Dixon, *supra* note 11, pp. 70-72.
[16] *Id,* p. 30.
[17] North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands), Merits, 1969 ICJ REP. 25 (Feb. 20), para 77.
[18] U.N. Charter, Article, 2(4)
[19] *Id,* Art. 1

inconsistent with the purpose of the Charter. No country shall instigate war. The message put forth in the Charter 1945 was very different international legal idea then in earlier centuries.[20]

Since then many have declared article 2(4) dead[21] claiming that States have abandoned it in their multiple strays from the prohibition of use of force. They claim that since law is created by States and since those very States do not obey the written rule as law the article is a dead text, meaningless for the very States it is aimed towards. Hence, is the *usus* of states inconsistent with article 2(4). On the contrary, all theses scholars fail to acknowledge the fact that every State, which appears to be straying from the Charter, maintains some justification. These justifications are always within the Charter as no State has claimed a new custom emerging or that the law is dead. Their justification is based on the current law, therefore enforcing the very law declared dead. The *usus* is therefore also the justifications made. What the countries *believe* is the law, *IS* the law.[22]

Although Art. 2(4) expresses a general ban on use of force, the Charter includes an exception, a justification for use of force, Art. 51, the right to self defence, which says:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[23]

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[20] Before the Charter any State had the right to go to war against any state for any reason. See, e.g. Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed. (United Kingdom: Cambridge University Press, 2005), p. 185 [hereinafter Y. Dinstein] and Martin Dixon*, supra* note 11, pp. 310-312.

[21] Glennon, *How war left the Law Behind,* N.Y. Times, Nov, 21, 2002*;* Thomas M. Franck, *Who Killed Article 2(4)?Or: Changing Norms Governing the Use of Force by States*, 64 AJIL, 809 (1970).

[22] Mary Ellen O'Connell, *International Law and the Use of Force,* The American Journal of International Law*;* Apr 2003; 97, 2; Academic Research Library pg. 446, at p. 3; Christina Gray, *International Law and the Use of Force*, 2nd ed. (New York: Oxford University Press, 2004) pp. 21-23.

[23] UN Charter, Article 51.

The article introduces the "inherent right of individual or collective self-defense" under special circumstances. There is an academic debate on the scope of the self defence as some scholars claim a wide interpretation and believe that the wording "inherent right" mean the right to self defence as it is in a customary matter therefore reaching much further then the right as put forth in article 51 of the Charter.[24] By contrast, there is an opposing school of thought that deems this to be erroneous and that article 51 should be interpreted narrowly.[25] The article is a clear justification for a departure from art. 2(4); which bans all use of force. They claim that since such drastic matter was taken, to ban *all* use of force and then introducing an exception, indicates that it should be interpreted narrowly.[26] Further, the Charter would suffer greatly if article. 51 were to be interpreted widely as it would heavily restrict the power of the Charter to impose non-use of force rule on States. Thus, it would undermine the intention of the framers of the Charter and every nation since ratifying it.

Article 51 puts forth certain requirements for self defence that must be fulfilled in order to be considered a legal self defence. First off, in the wording of the article, self defence can only be exercised "if an armed attack occurs [and] (…) shall be immediately reported to the Security Council."[27] Secondly, customary law, as well as the International Court of Justice, has introduced further requirements; *necessity, proportionality and imminence.*[28]

The International Law Commission's; Draft Articles on Responsibility of States for Internationally Wrongful Acts[29] [hereinafter ILC Articles] largly reflect customary international law, as they reflect; case law, *opinio juris* of States and other customs which

[24] Dissenting opinion of Judge Schwebell, the *Nicaragua* case, *infra* note 77.
[25] Y. Dinstein, *supra* note 20, pp. 183-4.
[26] *Id.*
[27] UN Charter, Article 51
[28] Gray*, supra* note 22, p. 167; Tarzinio Gazzini, *The Changing Rules of Force in International Law*, (Manchester: Manchester University Press, 2005), pp. 192-194, Rachael Lorna Johnstone, *State Responsibility: A Concerto for Court, Council and Committee,* (winter 2008), 37,1; Denver J. Int'l L. & Pol'y, p. 79, footnote 129.
[29] Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) [hereinafter ILC Articles].

have gained legal status.[30] The ILC Articles emphasize on the secondary rules of State responsibility, that is to say; under general circumstances whether states are responsible for wrongful actions or omission and legal consequences for breaches.[31] It is not within its function to define what these obligations, breach of which would invoke state responsibility, are. This is a function for primary rules.[32] Each and every article will only be assessed if and when the subject matter calls for it but for the purposes of this paper, reliance shall be made principally on the first part, identifying when conduct is attributable to a State.

The Role and the Powers of the Security Council

Article 51 includes that nothing "shall impair the inherent right of (…) self defence (…) until the Security Council has taken the measures necessary to maintain international peace and security". Some have claimed that since the Security Council introduced compulsory measures under chapter VII in resolution 1373, the Council *had* taken necessary measures as mentioned in article 51.[33] On the contrary, beyond the practice that self defence can exist coincidentally with the Security Council's measures (which, due to lack of space will not be detailed here)[34] lies the reality that *peace and security* had not be achieved by a doctrine issued by the Security Council. It would be absurd to claim that *any* measures by the Security Council were enough to impair the right of States to defend themselves.[35]

Within article 51 there is a duty to report to the Security Council when the article is raised to justify self defence. This can be interpreted to mean that for self defence to be legal the Security Council must not only be notified but that the Security Council must authorize the self defence.[36] This raises the question whether the powers of the Security Council can

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[30] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), reprinted in 46 I.L.M. 85 (2007) (Feb. 26 [hereinafter the *Genocide case*]. Paras 385, 398
[31] ILC Articles, *supra* note 29*,* General Commentary, para. 1.
[32] *Id.*
[33] Thomas M. Franck, *Terrorism and the Right of Self-Defense*, The American Journal of International Law, Vol. 95, No. 4. (Oct. 2001), pp. 841-2.
[34]*,* In SC Res. 661, pmbl. (Aug. 6, 1990), the council affirmed the inherent right to self defence. In SC Res. 678, para. 2 (Nov. 29, 1990), four months later took measure coinciding the self defence already taking place. For a discussion of this practice see Franck, *Id.*
[35] Franck, *Id.*
[36] The Court held in the Military and Paramilitary Activities in and against Nicaragua Merits, (Nicaragua v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter the *Nicaragua case*], that "*There is*

then limit the *inherent right to self defence*. Although the Charter speaks of the *inherent right* to self defence it would damage the Security Council's tools and limitations to the extent that it could not exercise its function correctly if States could exercise self defence without consent. In other words, can a decision of the council *veto* the *inherent right* of self defence, described in the Charter?

When addressing threats to international peace the Security Council has rarely spoken of article 51.[37] First off, this is understandable since article 51 introduces an *inherent right* which in a sense limits the power of the Security Council. The Security Council works within the Charter and is bound by it. Hence, because the Charter speaks of the *inherent right* the Security Council cannot impair that right, because it is inherent. That creates a dilemma and denying a State its inherent right to self defence would be illegal if all other areas were fulfilled. Secondly, it is not the Security Council's "place" to *invoke* situations of self defence. Only States can invoke the inherent right to self defence. Even so, it would not be strange for the Council to *recognize* or *reaffirm* the right but it is far from necessary for self defence to be exactly permitted by the Council.

The *inherent right* to self defence does not involve the Security Council in any other way than the need to report. The Security Council's approval is not needed, although in almost any case it might be preferable. In addition, the Security Council's silence *is* an endorsement or at least an approval in relation to latter half of article 51 which says that self defence "shall not in any way affect the authority and responsibility of the Security Council [...] to maintain or restore international peace and security."[38] Meaning that *if* the Security Council disapproves of the actions, which the State has or is about to take, it must address the issue and under Chapter VII *veto* the exercise of self defence because it is or would be a threat to international peace and security.[39]

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no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation." Para. 195.

[37] Pre-9/11 it was only; S.C. Res. 546, U.N. Doc. S/Res/546(Jan. 6, 1984) and S.C. Res. 573, U.N. Doc, S/RES/573(Oct, 4, 1985)

[38] U.N. Charter, Article 51.

[39] Derek Jinks, *State responsibility for the acts of private armed groups*, Chicago Journal of International Law; Spring 2003; 4,1; Academic Research Library, pp. 86-87; Gazzini, *supra* note 28, p.195

Nonetheless, it should not be forgotten that the Security Council could hardly ever produce a resolution condemning an act of the United States or the United Kingdom.[40] The structure of the Security Council and the *veto*-powers of the permanent members render the Security Council powerless against acts of these nations.[41] Since the Security Council is the one who interprets the Charter and since, in a way, it is bias towards the dominant States in international law, it is near to impossible for the Council to take actions against illegal acts of these States.

Although the Security Council has a big role to play in the international legal spectrum, its structure and quasi-legislative powers are much debated and have been the centre-point in numerous articles.[42] Beyond the discussion above, there will be no further discussion of the binding powers of the resolutions due to lack space and as it is not required for the outcome of this thesis.

The value of the justification, did it meet the requirements? US and UK's letter to the Security Council; their justification for the invasion

NATO invoked for the first time art. 5 of the Washington treaty which states; "armed attack against one or more [member states] (…) shall be considered an attack against them all" [43], invoking collective self defence calling on all member states to come to U.S's aid. They demanded that the Taliban regime would close all Al Qaeda training camps, hand over Osama Bin Laden and other members of Al Qaeda and open their borders to NATO's (U.S.) inspectors. In the immediate aftermath, the Taliban's refused and *Operation Endure Freedom* was initiated.[44]

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[40] Or any act of the other permanent members; Russia, China and France.
[41] UN Charter, article 27.
[42] *E.g.* Paul C Szasz, *The Security Council Starts Legislating,* 96 American Journal of International Law. 901 (2002); Jose Alvarez, *Hegemonic International Law Revisited,* 97 American Journal of International Law. 874 (2003), Gaetano Arengio-Ruiz, *On the Security Council's 'Law-making'*, 83(3) Rivista di Diritto Internazionale 609 (2000). Gazzini, *supra* note 28, pp. 7-14,
[43] The North Atlantic Treaty, Washington D.C. - 4 April 1949, Art. 5.
[44] Sean D, Murphy, *Contemporary Practice of the United States Relating to International law*, The American Journal of International Law; Jan 2002; 96, 1; Academic Research Library. pp. 243-7

On 7th of October almost a month after the attack of 9/11, Security Council permanent members the United States and the United Kingdom informed the Security Council, *via* two letters to the Council that; "[in] accordance with Article 51 of the Charter of the United Nations, I wish, (…) to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001."[45]

They continue describing the attacks on the United States conflating them to an armed attack and claim that they have "obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks."[46]

Taking a step further, they claim that the Taliban regime supports the ongoing threat by their decision "to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation."[47] They continue by stating that United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.[48]

In the sister letter presented by the representative of the United Kingdom that the self defence "is directed against Usama Bin Laden's Al Qaida terrorist organization and the Taliban regime that is supporting it."[49]

The next day the United Kingdom representative presented a new letter in which they claim that "Usama Bin Laden and Al Qaida were able to commit these atrocities because of their close alliance with the Taliban régime, which allowed them to operate

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[45] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2001/946
[46] *Id.*
[47] *Id*
[48] *Id.*
[49] Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2001/947

with impunity in pursing their terrorist activities."[50] The letter continues, claiming that "Usama Bin Laden's Al Qaida and the Taliban régime have a close and mutually dependency alliance" and continue, "Usama Bin Laden could not operate his terrorist activities without the alliance and support of the Taliban régime.[51]

Both the United States and the United Kingdom's letter present a causal link between those planning, coordinating and executing the attack (Al Qaida) and those who support and harbour them (Taliban regime). Neither, however, claims that the Taliban controlled Al Qaeda or that they coordinated the attacks.[52] Further, they do not claim that the Taliban did, in any event, know about the attacks beforehand. The justification for entering Afghanistan in exercising self-defence aimed at "Usama Bin Laden's Al-Qaeda terrorist organization and the Taliban regime" was the claim that the attacks were made possible because members of Al Qaida were allowed to operate within Afghanistan's borders and Afghanistan had failed to apprehend and hand over Osama Bin Laden. [53]

PART II – Who can be responsible for the 9/11 attack?

After 9/11, much debate has risen over the existence of *armed attack* and to what extent self defence reaches and what criteria must be fulfilled for legal self defence.[54] No question has caused more discussion in international law circles than over State responsibility. The United States, when responding to the terrorist attacks they had suffered, raised the self defence claim and invaded Afghanistan and overthrew the Taliban regime. Although not widely recognized, the Taliban was still the *de facto* government of Afghanistan, which had not been proven to even have known of the impending attacks. The question remains whether the Taliban were responsible for Al Qaida's acts. What must be borne in mind is that any military

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[50] Letter dated 8 October 2001 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2001/949.
[51] *Id*
[52] Hinting an "overall control" in accordance with the test provided in *Tadic Case*, *infra* note 83, discussed below.
[53] *Supra* note 45 & 50.
[54] The existence, and criteria, of self defence will be discussed below in Part III.

action in another State, even only targeted on terrorist group or facility, involves a violation of that States sovereignty.[55] The question is whether that violation is justifiable?

State responsibility

> Every internationally wrongful act of a State entails the international responsibility of that State.[56]

Pre-9/11, an armed attack was not thought to be possible by anyone other than a state. Only states had the fund and the power to execute an attack on such a scale, being therefore the only ones that could trigger article 51. Even though the textual interpretation of article 51 does not exclude attacks by non-states actor the Charter was drafted with the assumption that it governed inter-state relation and that all incidents regarding use of force were therefore between states.[57]

In their letters to the Security Council, justifying their action towards Al Qaeda and the Taliban regime, neither the United States nor the United Kingdom introduced any evidence that the Taliban regime, the *de facto* government of Afghanistan, had coordinated, planned, acted or even known of the attack beforehand. Although the Unites States letter impute an involvement to the Taliban and the United Kingdom's letter claim that the terrorist attack never could have taken place without the "support" from the Taliban regime, [58] the question still arises whether the Taliban's, whom United Kingdom and United States did not show knew about the attacks, were responsible. Does the Taliban's support and aid to Al Qaeda trigger responsibility on their part and is that responsibility essential to justify the measures taken against them?

What kind of responsibility?

Article 2 of the ILC Draft Articles on State Responsibility says regarding, the elements of an internationally wrongful act of a State:

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[55] Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility,* (Oxford and Portland, Oregon; Hart Publishing, 2006) p. 158. [hereinafter Tal Becker]
[56] ILC Articles, *supra* note 29, Article 1.
[57] Helen Duffy, *The 'War on Terror' and the Framework of International Law*, (United Kingdom: Cambridge University press, 2005) p. 159, footnote 67.
[58] *Supra* note 45 & 50.

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Under article 2(b) referred to in many cases[59] there is an internationally wrongful act when a State breaches an international obligation. This article also applies when States fail to take "appropriate measures".[60] This does mean that under article 2 a *wrongful act of a State entails the international responsibility of that State*.[61]

Res. 1368 expresses that "those responsible for harbouring terrorists (…) will be held accountable."[62] To what extent does that responsibility reach? Are the States solely responsible for the harbouring, or also for the acts of those whom they harbour? If the latter is true, and States assume responsibility, then States can be held responsible for "armed attacks" orchestrated by terrorist groups and are therefore subject to lawful use of force in self defence.[63] The problem arises as to whether States which harbour terrorists *should* suffer the same consequences for lesser violation (harbouring terrorists as opposed to conducting an armed attack).. To respond, the procedural rules and the requirements put forth in the article itself would protect the harbouring state. Self defence cannot be used *male fide* because of the requirements like necessity and proportionality. Hence, theses requirements "protect" the harbouring state from punitive and disproportioned measures.

On one hand, if the responsibility is only for abstaining from action, harbouring or the supporting terrorists, it does not entail enough "punishment" for States to refrain from these actions. On the other hand if the State gains the responsibility for the act of the group supported it would lay enormous responsibility on States.

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[59] ILC Articles, *supra* note 29*,* Commentary on Article 2, para, 7.
[60] *Id,* Commentary on Article 2, paras, 7 & 10.
[61] *Id,* Article 1; which has been approved on many occasion, e.g. *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4 (9 April) 22, p. 23 [hereinafter *Corfu Channel Case*], *Nicaragua* case, *supra* note 78; see also ILC Articles, *supra* note 29, Commentary on Article 1. para 2.
[62]S/RES/1368
[63] R.L. Johnstone, *supra* note 29, p. 36.

According to some scholars, a State which fails or is unable to prevent or, more compelling, is involved indirectly but not so that it amounts to responsibility, must tolerate that the Victim State may resort to coercive actions against those directly responsible.[64] The Victim State is therefore granted the right to violate another States territorial integrity, defending their own, rather than suffer further attacks.[65] This does on the other hand not allow the Victim State to exercise coercive actions against the State failing their obligation, but only against those who committed armed attack (and thus triggered the self defence). [66] According to this theory the United States along with its allies were in full right in all their actions against Al-Qaeda, bin Laden and all those who had direct responsibility for the 9/11 attack. Alternatively, they had no right in removing the Taliban regime from power or to execute military actions against non-Al Qaeda targets.

In *Corfu Channel* the Court reached the conclusion that although the Albanian Government could not be proven to have laid the mines they bore responsibility as "nothing was attempted by the Albanian authorities to prevent the disaster' and it was these 'grave omissions' that triggered the responsibility of the State"[67] The Court did not limit the responsibility for failure to prevent but for the explosion which occurred.[68]

The Court has though, in more recent cases, relied on direct responsibility of States. States are therefore only responsible for the conduct if the perpetrators are *de facto or de jure* State organs or if the States has acknowledged the conduct.[69] Without the direct responsibility the 'supporting' State has only been responsible for the aid and support. This practice implies that States are only responsible for their own conduct but not for the conduct of the non-state actor in cases where they cannot be imputed to the State.

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[64] Tal Becker, *supra* note 55, pp. 161-2, Y. Dinstein, *supra,* note 120, pp. 204–8.
[65] *Id.*
[66] Tal Becker, *Id,* p. 163, R Wedgwood, *'Responding to Terrorism: The Strikes against Bin Laden',* 24 *Yale Journal of International Law,* 559, 565 (1999) *in* Tal Becker, *Id.* pp. 163-4.
[67] *Corfu Channel, supra* note 61.
[68] *Id,* see also; Tal Becker, *supra* note 55, pp 311-12.
[69] 'Effective control', see *Nicaragua's* case, *supra* note 36, *Genocide* case *supra* note 30, 'Overall control', see Prosecutor v. Tadic, Appeal of the Judgment, No. IT-94-14, I45 (July 1.5, 1999), 38 ILM 15 18, 1.546 (1999), 'Acknowledgment of the conduct', see *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Merits)* [1980] ICJ Rep 3, [69]. [Hereinafter *Tehran Hostage Case*]. See also Tal Becker; *supra* note 55, pp. 170-172, especially - footnote 46.

Even so, if a state is found responsible for an internationally wrongful act it should be subject to all of international law but not just parts of it. If that internationally wrongful act amounts to an armed attack article 51 applies to its fullest allowing the injured state to exercise its inherent right of self defence.

State organ/agent

Some Scholars have presented the principle that direct responsibility for an act of a person or entity can arise solely through that entity's status as a state organ or agent or by an espousal of its conduct by the State.[70] This view was especially wide prior to 9/11 attack. Robert Ago claimed in his report on State responsibility:

> Where it can be seen that [the] Government encourages or even promotes the organization of such groups, that it provides them with financial assistance, training and weapons, and coordinates their activities with those of its own forces for the purpose of conducting operations, and so on, the groups in question cease to be individuals from the standpoint of international law. They become entities which act in concert with, and at the instigation of, the State, and perform missions authorized by or even entrusted to them by that State (…)those activities are attributed to the State and constitute internationally wrongful acts of the State.[71]

The ILC Articles on State Responsibility expressly state in art. 4, dealing with the conduct of organs of a State;

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[72]

A State is responsible for the actions of *de facto* or *de jure* State agents.[73] There has been some discussion about who was the State in Afghanistan, including the extent to which the Taliban relied on Al Qaeda, and even the possibility that Al Qaeda controlled the Taliban but

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[70] Tal Becker, *id.*

[71] R. Ago, *'Fourth Report on State Responsibility' (1972)* Yearbook of the International Law Commission, Volume II, UN Doc A/CN.4/SER.A/1972 /Add. 1, p. 120, para, 136.

[72] ILC Articles, *supra,* note 29, Article 4.

[73] Tal Becker, *supra* note 55*,* p 171, ILC Articles, *id*.

not *vice versa*.[74] If true any action of Al Qaeda could be considered an action of the State; or of State agents. This view is far from being proven and must therefore not be relied on. In any event, Al-Qaeda was not appear to be directly a part of the Taliban government and its structure does not imply that they were state organs under article 4. Alternatively even though a terrorist group could be considered a State agent it would not in itself constitute armed attack if other criteria were missing.

Sean Murphy has similarly relied on Article 9 of the ILC Articles to assert Taliban's responsibility.[75] Art. 9 deals with an actor exercising acts only exercisable by a governmental authority:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[76]

Thus, the Taliban regime bears responsibility on the basis that it allowed Al Qaeda to exercise governmental functions in the form of projecting force abroad.[77] This can hardly be considered the case since art. 9 deals with the situation when a private actor takes on governmental authority out of sheer necessity, in cases of failed government or in situation where there is need for governmental function.[78] Article 9 would therefore only apply if the Taliban were considered as an ill- or non-functional government.[79] Then, perhaps Al Qaeda could have been exercising governmental authority. Even so, although the claim *can* be made, that governmental function of an Afghani government would entail a terrorist attack on the United States; it is at *best* highly unconvincing.

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[74] Maria Ressa, *Bhutto: Pakistan key to the future of the Muslim world,* CNN.com Nov. 27, 2001, (accessed 7.mai, 2009) http://archives.cnn.com/2001/WORLD/asiapcf/south/11/26/gen.intv.bhutto/index.html

[75] Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N.* Charter, 43 HARV. INT'L L.J. 41, (2002) pp. 49-50 (Available on Lexis)

[76] ILC Articles, *supra,* note 29, Article 9.

[77] Murphy, *supra,* note 75

[78] ILC Articles, *supra,* note 29, Commentary to article 9, paras 1-6. See also; Tal Becker, *supra* note 55*,* p. 235.

[79]Even if Al Qaeda was not widely recognized, government they were the *de facto* government.

Control

ILC Articles on State responsibility expressly states in art. 8 dealing with 'effective control' (*Nicaragua case*) or 'overall control' (*Tadic Case*):

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.[80]

In *Nicaragua case* the acts of the Nicaragua Contras could not *per se* be imputed to the United States since they did not give direct orders.[81] On one hand, the Court held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives.[82] On the other hand the court reached the conclusion that United States had not "exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf." [83] The Court introduced and reached the conclusion that the United States were not proven to have had *effective control* and could therefore not be legally responsible.[84] Although irregular armed forces could constitute armed attack and while it may be unlawful intervention to render assistance to those armed groups, in itself it does not constitute an armed attack on behalf of the state rendering the assistance. The Court did not believe that; "assistance to rebels in the form of the provision of weapon or logistical or other support" rates as an armed attack.[85]

In *Prosecutor v. Tadic* the International Criminal Tribunal of Yugoslavia expanded the *Nicaragua's effective contro*l where states had to issue a direct order to bear responsibility claiming that the *effective control* was a "too narrow interpretation"[86]. According to *Tadic* a State bore responsibility *de facto* even if there were no special instructions or control by a state concerning each and every individual act. Groups could therefore act with great autonomy and still be considered under the control of a State just as long as the State conducts overall control. The Bosnian Serb army could therefore be imputed to Serbia

[80] ILC Articles, *supra* note 29, Article 8.
[81]*Nicaragua case, supra* note 36, paras 110-15.
[82] *Id,* para. 86.
[83] *Id,* para.109.
[84] *Id,* paras 62 and 64–65, 109-115.
[85] *Id,* paras, 126-7.
[86] *Tadic case, supra* note 69, paras 115-145.

because the Serbians had exercises *Overall Control*.[87] Although *Tadic Case* was abandoned in the *Genocide Case* when the Court returned to the *effective control* test[88] it remains important because, at the time of the 9/11 attack; it was the most recent interpretation of control and was therefore not unreasonable that States relied on this test.[89] It is similar to some dissenting opinions[90] as well as it provides an insight to a popular view of State control amongst scholars.[91] In addition, the Courts decision to return to its decision in *Nicaragua case* and deny the broader *overall control* test given in the *Tadíc case* appears to be incompatible with other bodies of the United Nation[92] or the general consensus of member states.[93]

Helen Duffy claims that the extent of control mentioned in both Nicaragua and Tadic goes further than the control in the case of the Taliban regime and Al Qaeda. It is essential to demonstrate that the acts of the group (irregulars) were attributable to the state, using the"effective control" test.[94]

Even if the Taliban regime had overall control over the territories where the training camps and the perpetrators were, this does not imply that they had overall control over the terrorist groups residing there. Neither United States nor United Kingdom claimed, in their letters to the Security Council, that the Taliban had been more directly involved in the attack than by harbouring and supporting the perpetrators.[95]

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[87] *Id.* Paras 98-145
[88] *Genocide case, supra* note 30, para. 403.
[89] *Tadics* "overall control" test was also available alongside, and equal, to the "effective control" test of *Nicaragua Case* in the ILC Articles, *supra* note 29, Commentary to Article 8, paras 4-5.
[90] Al Khasani in *Genocide case*, *supra* note 30, and Judge Schwebel in *Nicaragua Case*, *supra* note 36.
[91] Tal Becker, *supra* note 55, pp. 172-3 & 181-3, especially footnote 53-56
[92] Securities Council mention of self defence in Res 1368 & 1373 and further ideology, State practice and the wide support states gave to United States support in their military activities.
[93] R.L. Johnstone, *supra* note 28, pp.90-3
[94] Duffy, *supra*, note 57, p. 160, footnote 73.
[95] *Supra* note 45, 49 & 50

Acknowledgement of the Conduct

Article 11 of the ILC draft articles on State responsibility about conduct acknowledged and adopted by a State as its own says;

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Nevertheless, the ILC commentaries does convey "as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it."[96] Positions that amount to approval or endorsement in general sense do not amount to an assumption of responsibility without further acts.[97]

In the *Tehran Hostages Case,* although the hostile takeover of the embassy could not be proved to be orchestrated or executed by the Iranian government, the Court, none the less, reached the conclusion that Iranian government bore responsibility. The judgment indicates that since the Iranian government chose to approve and endorse when it was capable of putting an end to the situation[98] this support of the Iranian government was deemed to fall within the scope of the 'effective control' without the Iranian government planning or executing. [99]

According to Dinstein the Court held that "if the authorities of one State are required under international law to take appropriate acts in order to protect the interest of another State, and – while they have the means at their disposal to do so – completely fail to comply with their obligations, the inactive State bears international responsibility towards the other State"[100] "[Iran's] plain duty was at once to make every effort, and to take every appropriate

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[96] ILC Articles, *supra*, note 21, Commentary to Article 11, para. 6.
[97] *Id.*
[98] *Tehran Hostage case supra* note 69, at 32-33.
[99] Tal Becker, *supra,* note 55, pp. 225-6.
[100]Y. Dinstein, *supra* note 20, p. 206 - footnote 172 reffering to *Tehran Case, supra* note 69 at 32-33, 44.

step, to bring these flagrant infringements … to a speedy end… and to offer reparation for the damage.[101]

Y. Dinstein holds that a State that does not fulfil its international obligation (of "vigilance") and fails "in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign Government or which might endanger the latter's security, *assumes* international responsibility for this international wrongful acts of omission"[102] Elsewhere he claims that:

> In blatantly and adamantly refusing to take any action against al Qaeda and Bin Laden, and in offering them a sanctuary within the territory under its control, the Taliban regime in Afghanistan espoused the armed attack against the US. From the moment of that espousal, the US could invoke the right of individual self-defense against Taliban-run Afghanistan and use counter-force against it."[103]

Dinstein presupposes the responsibility by an act (the support and harbouring) taken before the attack, when an act (the 9/11 attack) can only be *assumed* after it has taken place. Moreover, the Taliban express their full condolences and condemned the attacks, albeit opportunistically and unsatisfying. Further, after the 9/11 attacks the Taliban offered to submit bin Laden to a 3rd country[104]. These actions seem to stand in stark contrast to the explicit endorsement proffered by Iran in the *Tehran Hostages* Case [105] and therefore undermining Dinstein's usages of article 11. Further, the incidents differ from each other significantly as, although the Taliban might have had some ability to limit future activities of Al Qaeda, the situation in Afghanistan was not as clear cut as taking action to release hostages within Iran's capital city.

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[101] *Tehran Hostage* case, *Id.* Para 69

[102] Y. Dinstein, *supra,* note 29, p. 206, [emphazis added] see also, Ago, *supra* note 71.

[103] Yoram Dinstein, *'Comments on the Presentations by Nico Krisch and Carsten Stahn' in C Walter, et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty? (Berlin, Springer, 2004) 915, 920* in Tal Becker, *supra* note 55*,* pp. 225-6

[104] On the other hand did the US claim that the Taliban were unnegotiationable based on many attempts by the Security Council and others. Gazzini, *supra* note 28, pp. 190-1.

[105] Tal Becker, *supra*, note 50, p. 226 , See also Y. Dinstain, *supra* note 20, pp. 236-237

Aid, Harbour and Support

In their letter to the Security Council the United Kingdom claimed that Al-Qaeda could not have orchestrated and commenced these attacks without the support of the Taliban regime.[106] The obligation to refrain from supporting terrorists has long been admitted as a principle of customary international law.[107]

Even if the Taliban regime cannot be have proven to show an "overall control" or "effective control" there is the question of whether they *ought* to have control. The Security Council had on number of occasion prior to the attacks asked the Taliban regime to: "seize the provision of sanctuary and training for international terrorists."[108] It cannot be consider a heavy burden on a state not to harbour a "known" terrorist. States are considered to be responsible for a wrongful act if they do not fulfil their international obligation. State must show exercise due diligence in meeting its positive obligations, including its obligations to prevent private acts of terrorism. [109]

Wolfrum and Phillip suggest in their book; *The Status of the Taliban: Their Obligations and Rights Under International Law* a use of Article 16 to assert Taliban responsibility which, regarding aid or assistance in the commission of an internationally wrongful act, says; [110]

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
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> (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and
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> (*b*) the act would be internationally wrongful if committed by that State.

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[106] *Supra*, notes 45 & 50.
[107] *Corfu Channel* Case, *supra* note 61, p. 22.
[108] S.C. Res.1267, U.N. Doc. S/RES/1267(Oct. 15,1999) & S.C.Res.1333, U.N. Doc. S/RES/1333 (Dec.19, 2000)
[109] *Corfu Chanel Case, supra,* note 61, p 22.
[110] R Wolfrum and CE Phillip, *The Status of the Taliban: Their Obligations and Rights Under International Law* (2002) 6 Max Planck Year Book of United Nation Law. [hereinafter Wolfrum and Phillip] As articulated below, in part III, non-state actors *can* commit armed attack.

If a state bears responsibility for aiding another State in executing an internationally wrongful act it would be odd not to assume that the same would apply if a state aided a non-state actor capable of the same wrongful acts as a State.[111] Although the ILC commentaries on Art. 16 says that "the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act"[112] as the supporting State it would be subject to the *same measures* as the acting State, [113] including self defence. It would not bear the same (direct) responsibility but would bear responsibility nonetheless – responsibility for aiding and supporting.

As the Court has claimed that "assistance to private armed groups could be an unlawful threat or use of force by the State, even if it did not necessarily amount to an armed attack" [114] the aiding state would according to this theory be subject to the same measures as the attacking non-state actor and could therefore be subject to self defence.

When drafting of the Charter the Chinese representative introduced an extra wording to the definition of aggression, or what constituted aggression.

> Provision of support to armed groups, formed within [a state's] territory, which have invaded the territory of another state; or refusal, notwithstanding the request of the invaded state, to take in its own territory all the measures in its power to deprive such groups of all assistance or protection. [115]

As this wording was not accepted in the final Charter text, it demonstrates that there was no consensus that such support or harbouring constitutes aggression. Therefore, harbouring and supporting cannot be considered equivalent, nor can the right of self-defence be equivalent. Similar suggestions have been made, and disapproved, on number of occasion, especially during the Cold-War where proxy-warfare was commonly used.[116] This does, on the other hand, only demonstrates no consensus of it being an aggression and therefore not entailing direct responsibility, but has nothing to do with the legality of counter- measures. Wolfrum

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[111] Tal Becker, *supra* note 55, pp. 224-6.
[112] ILC Articles, *supra* note 29, Commentary on Article 16, para. 1.
[113] Wolfrum and Phillip, *supra* note 110, p 595
[114] *Nicaragua Case*, *supra* note 36, pp. 118–19 (majority); see also, p. 324 (Schwebel); *and*, p. 542 (Jennings).
[115] Tentative Chinese Proposals for a General International Organization (Aug. 23, 1944), (1944), Foreign Relations of the United States, 718,725 in Frank, *supra* note 37 p. 5
[116] Tal Becker, *supra,* note 55, p. 179.

and Phillips' proposal is very appealing as it does not entail an espousal of direct responsibility. The State is only responsible for their own conduct, although they may be subject to measures taken by the Victim State.

Involvement, not Responsibility?

If a State has clear knowledge, without using control or any other means other than financing, harbouring and training, the end result is the same as direct control. When that State fails its international obligations severely, the *male fide* of the State knowing that without their aid and support the actions of the group were impossible and further denies to exercise due diligence towards other States refusing to cooperate both in expression and in conduct, this involves the State on a level that it may be subject to some countermeasures taken in self defence. Therefore the State's involvement and closeness would not entail a direct responsibility under the ILC Articles though the State may be subject of legal self defence.[117] This would have to fall within other requirements of self defence; necessity and proportionality. Both necessity and proportionality test would "protect" the supporting State from any unnecessary and disproportionate measures. Taken into account, the idea of Wolfrum and Phillip becomes even more appealing as the question wouldn't be the responsibility of the state but its involvement and the supporting State would be subject to full article 51.[118]

Conclusion

It thus appears the Taliban were not directly responsible for the attacks under the established principles of state responsibility. They might on the other hand assume responsibility for the acts of the non-state actors because of their conduct and by virtue of their failure to fulfil their positive obligations. Even so, although Dinstein's idea that the Taliban had acknowledged the acts does not quite add up on facts, it still remains that the attacks could not have been carried out without the aid, harbouring or the support provided by the Taliban. Although the Taliban regime does not bear direct responsibility for the attack it bears full responsibility for the aid, support and their failure to fulfil their positive obligations

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[117] Of course the State has to have breached some international obligation and not exercised due diligence in their actions.

[118] See discussion above about Wolfrum's and Phillips idea about; ILC Article, art 16 above, *aid, harbor and support,* see also *supra* note 110.

just as it would be if another state were the direct perpetrator but not a terrorist group. If this failure does not allow States, under self defence to take measures against the group responsible it does render the *inherent right* to self defence powerless. “Supporting” States who knowingly fail their obligation and support, aid and harbour terrorist may therefore be subject to a violation of their territorial sovereignty without bearing direct responsibility.

Further, their involvement in an attack on a foreign country could, if necessity called for it, and within proportionality, allow the victim state to exercise self defence against the supporting state.

Further, their involvement in an attack on a foreign country could, if necessity called for it and within proportionality, allow the victim state to exercise self defence against the supporting state.

This thesis has not addressed, due to lack of space, the ideas of some scholars that a new ‘instant’ custom emerged from the 9/11 attacks and State responses afterwards.[119] States have before relied on self defence against terrorism before, but in those incidents they have been declared a violation of 2(4), not based on the inapplicability of the self defence claim itself but simply for not being necessary and proportioned. The 9/11 case is the same as those cases, but states (and other parties) seem to consider it to better meet the proportionality and necessity tests.[120] Thus, it is this author’s view that this is better understood as a further application of the previously defined rules on self defence, rather than a new custom.

PART III – Self defence, general rules and restrains.

Armed attack

Article 51 self defence is only applicable where a state has suffered an *armed attack.* Article 51 does not define “armed attack”, nor is there a definition elsewhere in the Charter is unclear. It must be interpreted in light of the wording of the article and in accordance with

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[119] For a good overall discussion on whether a new custom emerged see Tal Becker, *supra* note 55, pp 231-8.

[120] The requirements of necessity and proportionality in self defence are addressed below in Part III of this thesis

other portions of the Charter such as art. 2(4). The ICJ has also contributed an interpretation.[121]

Who can carry out an "armed attack"?

The United States and the United Kingdom raise the right to inherent self defence after an armed attack orchestrated and executed by a terrorist group. Before 9/11, an attack of such a scale was only thought possible by a State, not by a non-state group. A terrorist attack as the one on 9th of September is a grave matter and can well be more vicious, more repellent and much bigger than any attack by a state. States tend to abide *Jus in Bello* as they are more compelled to have higher standards as they desire (or need) good international relations. States are also bound by the Geneva Conventions which prohibits and regulates many areas of warfare.[122] An attack by non-state actors can easily reach a level of gravity comparable to a violation sufficient to violate article 2(4) of the Charter regarding threat or use of force. However, the wording of article 2(4) seems to be directed at member states only.[123] Even though article 51 does on the one hand not in itself exclude other actor's than States, it is on the other hand, drafted on the assumption that it governed inter-state relation and that use of force is only capable by states.[124] Despite this assumption there is no textual obstacle in interpreting article 51 to apply to non-state actors as international law evolves.

> ICJ recognised in the *Nicaragua* case that armed attack may include;
>
> not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.[125]

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[121] *Nicaragua Case, supra* note 36, para 195.

[122] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, 75 U.N.T.S. 31, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, 75 U.N.T.S. 85, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 13.

[123] Article 2(4) speaks of "All Members(…) must refrain from use of force" It is clear that no group or individual can be a member to the United Nation, only States can.

[124] Duffy, *supra,* note 57, p, 159.

[125] *Nicaragua Case, supra,* note 36, para 195.

The Court says that; irregular forces, which can have little formal connection to the country which they "serve", can commit armed attacks. The sending of armed bands amounts to an armed attack only if; "because of its scale and effects" it would be more than a "mere frontier incident" but the court famously rejected the notion that mere assistance to rebels was an armed attack triggering the right of self defence.[126] This seems to exclude a military action by non-state actors with no connection to a State from amounting to an armed attack as there is no State responsibility. Different approach shows a different conclusion, that as the Court reaches the conclusion that "mere assistance to rebels" does not amount to armed attack by the *supporting State*, they do support, or at least not reject, the idea that *the rebel group* could constitute the armed attack in question.

The Court in another instance, in the *Wall Opinion 2004*, reach the conclusion that*;* "Article 51 of the Charter (…) recognizes the existence of an inherent right of self defence in the case of armed attack by one State against another State". [127] Even so, there is nothing which excludes or repels the idea that such an attack cannot be orchestrated by a non-state actor as it does not say *"only" by one State against another State.*[128] The courts seeming claim that self defence and armed attack is only applicable for states *vis-á-vis* one other seems to be in some contradiction to State practice which has on some occasion justified the use of force against repeated terrorist attacks.[129] Although this practice has almost always been condemned (as being a violation of article 2(4)) the self defence claim is not itself condemned. The condemnations were not regarding the legal justification *per se* but towards

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[126] *Id.*

[127] Advisary opinion on *Legal Consequences of the Construction of the wall in the Occupied Palestinian Territory*, 2004, 43 ILM 1009, 1050 (2004)

[128] *Id*, 1063, 1072, 1079 (Seperate opinion of Judge Higgins and Judge Kooijmans and the decleration of Judge Buergenthal)

[129] *E.g.* Israel in Lebanon 1982 (S/PV.2374, 5 june 1982, p.7); US in Lybia, 1986 (letter to the Security Council, 14 april 1986, S/1990) and Security Council meeting 15. April 1986 (S/PV.2674, 15 april 1986 p.17), US's airstrikes against Afghanistan and Sudan 1998 (Letter to the Security Council, 20 August 1998, S/1998/780) see also a discussion in Tal Becker, *supra* note 55 pp. 186-206, specially pp. 205-6, and also in Gazzini, *supra* note 28, p. 192

the requirements of proportionality and necessity.[130] State practice has showed a growing tolerance towards forcible responses to private terrorist attacks. [131]

Another point to be made is that the Court can only consider contentious cases of States *vis-á-vis* one another.[132] Therefore it can only assess armed attack in cases where a State is responsible. In other cases the only conclusion the court can reach is that the State's involvement does not amount to armed attack, notwithstanding whether an armed attack has occurred or not.

What strengthens the self defence claim against terrorist group is the language, of self defence, used by all parties (SC, EU, NATO, etc) when "all" facts were known.[133] This demonstrates the belief that self defence could be triggered by an attack from non-state actor e.g. Al Qaeda.[134] Further, Security Council's Resolutions 1368 and 1373 – "expressly recognized the right of self-defence" – the first time that Security Council had stated the right to use force in self defence against terrorist attacks.[135] And as previously stated international customary law is what the parties of international law believe it to be.

In any event, the attack on 9/11 clearly meets the *scale and effect*[136] requirement and is in breach of international peace and security.[137] It constitutes an armed attack since regular passenger planes were changed into weapons of great destruction capable of killing up to 20.000 people, allowing US government to any means necessary, including those of military nature.[138] The real question isn't about the definition of armed attack but whether an attack,

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[130] *E.g.* S/RES/573 (4. Oct, 1985), League of Arab State condemned action against Sudan but stayed silent towards the actions taken against Afghanistan in 1998 airstrikes, (Letter to the Security Council, 21 August 1998, S/1998/789)

[131] Tal Becker, *supra* note 55, pp. 205-6.

[132] Statute of the International Court of Justice, *see supra* note 9, Article 34(1)

[133] Like the fact that Taliban did not have a direct or an indirect control over the Al Qaida

[134] The European Union declared its *whole-hearted support for the action that is being taken in self-defence in conformity with the UN charter and the UN SC resolution 1368* (Press Release, Brussels, 7 October 2001), UNSC resolutions 1368 and 1373;"expressly recognized the right of self-defence"

[135] Rachael Lorna Johnstone, *Unlikely Bedfellows: Feminst Theory and the War on terror,* unpublished, Chapter containing '*The United Nations Security Council'*, p 18 - footnote, 43.

[136] *Nicaragua Case, supra*, note 36, para 195.

[137] S/Res/1368(2001)

[138] Gazzini, *supra* note 28, pp. 182-3

which was not coordinated by a state but by a third party organization, can activate the inherent right to self-defence and legalize the aftermath of 9/11.

To say that the terrorist attack on 9/11 met the requirements of an armed attack means that they are subject to the full application of article 51. The right to self-defence as the *inherent right* of states exists within that Charter as well as outside it. All the same, it is still bound by the Charter as an exception Art. 2(4). As it exists outside the Charter it is also subject to customary law boundaries (such as those in the Caroline case). [139]

Necessity and proportionality

Near the core of self defence is the notion that self defence must be necessary and proportionate. Self defence can only be exercised *bona fide* to be legal, as it allows states to respond to illegal acts, orchestrated with *male fide,* against them. It would therefore be preposterous to not put restrains on self defence as it would encourage usage in *male fide.*[140]

The proportionality and necessity requirement is dated back to 1837, the *Caroline* incident, in which both the United States and the United Kingdom seemed to accept the idea that a state asserting self-defence must demonstrate its "necessity(…)[as] instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[141]

It is debatable whether the necessity mentioned in *Caroline Case*[142] which requires a necessity of self defence and "leaving no choice of means, and no moment for deliberation" [143] was left when the response to the attack was precluded for 26 days which can hardly be considered to fall into the scope of *Caroline case.* It is, on the other hand, hard to argue that state preclude their right to self defence as it is important that States do not act in sheer blindness, perhaps acting towards wrong party.[144] Also, included in self defence is the immanence test that another attack is imminent. In cases like this there are other remedies

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[139] Tal Becker, *supra,* note 55, pp. 158-162.
[140] *Nicaragua case*, *supra,* note 36.
[141] *Letter from Daniel Webster to Lord Ashburton (Aug 6, 1842), quoted in* John Basset Moore, A Digest of International law, Lh\V 412 (1906).
[142] Caroline case, (1841) 29 *British and Foreign State Papers* 1137–8.
[143] *Id.*
[144] Duffy, *supra* note 57, pp. 157-8

preferable to military force, e.g. political lines, national cooperation, etc.[145] State practice has indicated that States believe they are obliged to resort to non-military measures first and only when these have proved unsuccessful can they resort to using military force.[146] The nature of self defence towards terrorist and requirements of inter-state relations suggests that states must first resort to diplomatic measures, pleading to the country “hosting” the terrorists to take measures against the terrorist in cooperation with the suffering state.

Many have deemed the *Caroline case* as irrelevant as it predates modern international law, in particular the Charter.[147] Even so the necessity and proportionality has been reaffirmed on many occasion, post-Charter.[148] Self defence must not be retaliatory or punitive; the aim should be to halt and repel and attack.[149]

Christina Gray claims in her book; “even if the actions were aimed at those actually responsible for the terrorist attacks, and even if the response could be accepted as proportionate, it is difficult to see how the use of force was necessary, given that the attacks on the national had already taken place”[150] She concludes by saying that the military actions were reprisals in nature and therefore illegal.[151]

As Gray, other scholars have also claimed that the immanency of another attack was missing in the aftermath of 9/11.[152] They claim that even though it can be shown that there was an armed attack on the US there is a certain immanency test to show that there is another imminent attack or that the attacks of 9/11 were part of one larger, ongoing attack that had not come to an end by September 12th. A simple attack cannot raise the need for self defence

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[145] Asking the Taliban to hand over Bin laden.
[146] Before US air strike on Libya 1986 US state to the Security Council that other measures had been tried. (S/PV. 2674, 15 april 1986, p 16).
[147] Gray, *supra* note 22, p.121 footnote 105, See also Y. Dinstein, *supra* note 20, p.249.
[148] *E.g. Nicaragua Case*, *supra* note 36, A Legality of the Threat or Use of Nuclear Weapons in Armed Conflict (Request by WHO), Advisory Opinion, 1996 I.C.J. 66 (July 8) and *Oil Platforms,* (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996.
[149] ILC Articles, *supra* note 29, Article 50; Declaration on Friendly relation, humanitarian law under the Vienna Convention, S/RES/188/1964.
[150] Gray, *supra* note 22, p. 163.
[151] *Id.*
[152] Franck, *supra* note 33, p. 840, Gray, *supra* note 22, p. 163.

since the damage has occurred and using armed force in such a case is considered a reprisal since there is no need for self defence.

In any event, Osama Bin Laden, the leader of the group responsible for one of the biggest attacks on America, did threat that the 9/11 attacks were just the beginning, therefore creating an imminent threat of another attack. The man who orchestrated the attack on the Twin Towers was to be taken seriously when threatening further attacks.

The proportionality test is also heavily debated. Without the space to enter this in any depth, the most convincing interpretation is that the reaction must not exceed its objectives, namely to stop military actions and prevent future incidents.[153] The proportionality and necessity tests also aids states in deciding the difference between a lawful self defence and an unlawful reprisal.[154] United States and United Kingdom's self defence was aimed at arresting and bringing members of Al Qaeda to justice and stopping any military threats or actions aimed at the United States. Their move against the Taliban regime is more questionable but can be explained as an attempt to prevent future incident by removing the government which harboured and aided terrorists. When the Taliban government had been replaced the nature of the military actions changed from *lawful* self defence to lawful military actions with consent of host state.[155]

As self defence takes form and is aimed at a terrorist group, like Al Qaeda, new problems arise. What is necessary and proportionate when dealing with terrorist groups? Terrorist groups act in a different way than regular or irregular armed forces as their purpose is not to "win" but to spread terror and fear. It is therefore hard or even impossible to predict the outcome of certain measures. It is not even clear what responses work in dealing with terrorists.

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[153] Gazzini, *supra* note 28, p. 149.
[154] ILC Articles, *supra* note 29, commentary on article 51, para. 7.
[155] *Id,* article 20.

PART IV – Conclusion

Does the Taliban bear international responsibility for the 9/11 attack?

No. Even if the Taliban supported, aided and provided safe haven to Al Qaeda they bear no direct responsibility as Al Qaeda cannot be imputed as a *de facto or de jure* organ of the State. Although, Y. Dinstein has claimed that Al Qaeda espoused the attacks by failing their international obligations, it is not sufficiently supported by the facts, which appear to show a concrete will *not* to assume the attacks.

Further, although the Taliban regime was not fully functional throughout the entire of Afghanistan and not widely recognized, the actions of Al Qaeda could hardly apply to article 9 of the ILC Articles as it is at least highly unconvincing that an attack on the United States was within governmental functions as mentioned in that article. The Taliban regime, in accordance with the ILC Articles, only bears responsibility for their conduct, that is, the support, aiding and the harbouring of terrorists.

Can armed attacks be committed by non-state actors (e.g. terrorists/Al Qaeda)?

Yes. Although some ICJ decisions *suggest* that armed attacks can only be committed by States, there is adequate evidence to leave this open to doubt. First are the strong dissenting opinions regarding the wording of article 51 of the Charter. Second, is the fact that the Court can only consider contentious cases of states *vis-á-vis* one another and is therefore only empowered to reach the conclusion that any particular incident, amounting to armed attack, was or was not attributable to a State, *without* having to specify whether or not such an incident amounted to an armed attack *per se.* This conclusion is also in line with a number of examples of state practice where States justified military actions by reference to self defence. All this demonstrates that armed attacks can be committed by non-state actors., thus triggering the right of self defence,

Were the attacks of 9/11 an armed attack?

Yes. The attack on 9/11 clearly meets *Nicaragua's,* "scale and effect" requirement and is in violation of international peace and security.[156] It constitutes an armed attack since regular

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[156] S/Res/1368(2001) and *Nicaragua Case, supra*, note 78, para 195

passenger planes were changed into weapons of mass destruction capable of killing up to 20.000 people. This triggers the United States' right of self-defence, including a military response. [157] Al Qaeda executed a plan to induce mass killing of civilians, to spread terror and threatened to continue with further attacks.

Was the response in line with the rules of self defence?

A) Necessity

Yes. Even if 26 days passed before United States invoked self defence, not fitting the immediacy test presented in *Caroline*, another custom has emerged and States see themselves obliged to try all other solution before carrying out military action.[158] Further, the necessity test involves a certain immanency test. Another attack must be imminent for the right of self-defence to arise as a single attack does not raise the necessity of military response. The damage has already occurred and the necessity for self defence; military actions, is precluded as there is no danger of another attack. The nature of terrorism is on the other hand based on the element of surprise and aims at causing as much damage as possible. The 9/11 attacks were very severe and any threat of further attacks was to be taken seriously as a threat of imminent attacks. As the Taliban had failed their obligation and had not put an end to the imminent attacks on the United States it was necessary to reduce to military actions, apprehending the perpetrators and prevent further attacks.

B) Proportionality against Al Qaeda?

Yes. The Taliban regime did not respond to their obligation to stop providing safe haven to terrorists and hand them over for trial. States which fails or is unable to prevent or, more compelling, is involved indirectly but not so that it amounts to responsibility, must tolerate that the Victim state may resort to coercive actions against those directly responsible.[159] United States had therefore every right to take actions against Al Qaeda rather than suffer another attack, made possible by the failure of the Taliban to fulfil its obligation.

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[157] Gazzini, *supra* note 28, pp.182-3.
[158] See main text, pages with footnotes 140 to 146
[159] Tal Becker, *supra* note 55, pp. 161-2, Y. Dinstein, *supra,* note 20, pp. 204–8

C) Proportionality against the Taliban regime?

Yes. With respect to the military response towards Taliban installations it was not unreasonable for United States when acting against a terrorist group to remove their political ties and funds. Addressing their self-defence against Taliban regime, as well as Al-Qaeda, even if they did not have direct responsibility for the attack, meets the second object of every self defence; to prevent future incidents. The Taliban regime was not widely recognized and did not have full governmental authority within Afghanistan. Even so their relationship with Al Qaeda entails responsibility for support, aid and harbouring terrorists. When an armed attack is committed with that support and in the aftermath the hosting State ignores its international obligations and fails to exercise due diligence to other States by their failure to deal with the matter, this State can expect a breach of their territorial sovereignty. The Unites States was therefore fully within the proportionality of the self defence, to prevent future incidents by removing the ill-functional government that supported, aided and provided safe haven to terrorist, making their attacks possible.

Was United States and United Kingdom response to 9/11 attacks legal?

Yes. In conjunction to the foregoing reasons the response was legal. What must be borne in mind is that this thesis does not assess whether the aftermath, when the Taliban had been overthrown, was in conjunction with international law and whether they met proportionality or necessity. It is the author's view that the prolonged situation in Afghanistan does *not* fall within these tests. Even so the steps taken before the prolonged military actions in Afghanistan, the self defence itself, was in full conformity with the contemporary state of international law.

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